

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD LEE BROWN,

Defendant and Appellant.

D069185

(Super. Ct. No. SCD254133)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Charles C. Ragland and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Ronald Lee Brown of assault with a deadly weapon (Pen. Code,<sup>1</sup> § 245, subd. (a)(1)) on victims Alvin Lucious (count 2) and Justin Rafanan (count 5).) It found true an allegation that Brown personally inflicted great bodily injury during the commission of the offense on Lucious (§ 12022.7, subd. (a)). The trial court found true allegations that Brown had suffered four prior serious felony convictions (§ 667, subd. (a)) and four prior strike convictions (§ 667, subds. (a), (b)-(i)).<sup>2</sup> It sentenced him to 50 years to life plus 43 years in prison, consisting of 25-year-to-life terms each on counts 2 and 5, three years for the great bodily injury enhancement, and 40 years for the prior serious felony convictions.

Brown contends the court prejudicially erred by admitting into evidence a 911 call that was inadmissible hearsay and unfairly bolstered the credibility of victim Lucious. He maintains his counsel preserved this claim by objecting on grounds the call contained double hearsay, but if not, his counsel's failure to do so was constitutionally ineffective assistance, requiring reversal. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

---

<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The jury acquitted Brown of two counts of premeditated attempted murder as to Lucious and Gregory Jennings (§§ 664, 187) and assault with a deadly weapon on Jennings. The People dismissed allegations that Brown had served six prior prison terms (§ 667.5, subd. (b)).

We state the trial evidence in the light most favorable to the judgment. (*People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Because Brown's sole claim of error relates to evidence of a 911 phone call reporting the incident in count 2 involving Lucious, we recount only the facts pertaining to that offense.

In January 2014, Lucious was at 16th and Island Street in San Diego near the God's Extended Hand Church, which provides food and shelter for homeless persons. He crossed the street to talk with a woman, and ended up speaking with Brown, who had approached and appeared to want to sell the woman marijuana. Lucious had seen Brown before in the area. Lucious became belligerent and used profanity with Brown, telling him he did not want Brown dealing with the woman. Lucious told the woman to leave and started walking to another ministry next door. The next thing he remembered was hearing someone say, "Watch your back," and he felt a thump and warm liquid on his neck. Lucious saw blood on his hand and when he turned around, observed Brown backing up and wiping the blood off his knife. Lucious said, "You stabbed me in the neck." Brown said, "Now I got to kill you." Lucious entered the nearby ministry where his friend Raymond Childs worked, and saw Brown trying to get inside after Lucious had locked the security gate. Childs came up to Lucious and asked what was going on; they walked back outside where Lucious pointed to Brown and said, "That guy, he stabbed me in the neck." Childs spoke with Brown and also called 911. Lucious recalled Brown was wearing a brown hooded coat and at the time had small thin braids or dreadlocks.

Lucious was taken by ambulance to the hospital. He was hospitalized over a month for

his neck wound. Lucious later prepared a statement about the stabbing to a detective as well as a diagram where it had occurred.

Traesey Horton was then a deacon at the outreach homeless ministry next door to God's Extended Hand. He worked with Childs at the ministry and was present on the day Lucious was stabbed. That day, Lucious came into the church bleeding profusely from his neck, and Horton put pressure on the injury until the ambulance arrived. A woman who was there with Horton, Tracy Atkism, called 911 to report that Lucious had been stabbed in the neck by a black man wearing a brown coat.<sup>3</sup> Horton saw an African-American man with a brown jacket and beanie trying to enter the church and Childs stopping him at the entrance. Horton believed the man in the brown jacket was the stabbing suspect based on Lucious's reaction to the man's attempts to enter. The next morning, Horton saw a person dressed in the same jacket and beanie come to their service and kneel down to Childs, appearing to apologize. Horton was not able to identify anyone when police presented him with a photographic lineup, however Brown appeared to be the same age, have the same color facial hair, and have the same height as the person he saw in the brown jacket that day.

Childs was in the church office and saw Lucious after he came inside. Childs walked outside with Lucious and saw a dark-skinned African-American man wearing a brown hoodie saying, "He threatened me," speaking about Lucious. Childs guessed he was the man involved with the incident with Lucious. The man, who Childs had seen

---

<sup>3</sup> Atkism, also known as Tracy Ann Favors, was deceased at the time of trial.

before, had dreadlocks and some gray in his hair and usually wore a hat. Childs initially declined to talk to police that afternoon, claiming he did not see anything happen. He later spoke with detectives but denied knowing who stabbed Lucious.

Brown was arrested in February 2014 after assaulting another man. The arresting officer testified that Brown asked him what had happened with "the other guy," and when the officer stated he went to the hospital, Brown smirked and responded, "That's cool, man."

Responding police officers testified at trial that the area of 16th and Island contained a large homeless population where drug use and sales occurred, and people there often did not want to get involved in police investigations or give statements. One officer testified that when he arrived at the scene, people were saying they had heard about a potential suspect with the nickname, "Rico," and it was common for people on the street to throw out nicknames. That officer prepared a photographic line up with a male matching the general description whose nickname was Rico, but neither Horton nor Lucious could identify Lucious's assailant from that line-up. The officer later showed Lucious a different photographic lineup including Brown's picture, and Lucious identified Brown as his assailant.

At trial, Brown denied any involvement in Lucious's assault, and stated he had never seen him before.

## DISCUSSION

## *I. Admission of the 911 Call*

The People moved to admit Atkism's 911 call before trial. In it, Atkism gave her location, followed by this exchange:

"Atkism: . . . . This, this, gentleman just got stabbed in his throat. We need paramedics or police right away.

[¶] . . . [¶]

"911 Operator: [Confirming location.]

"Atkism: Yes. Over here by God's Extended Hand Church. He's walking and he's bleeding real bad . . .

"911 Operator: Where's the . . .

"Atkism: . . . in his throat.

"911 Operator: When did it happen?

"Atkism: Just now."

Atkism told the dispatcher that the suspect was around the corner near a public restroom. After the 911 dispatcher told her she was putting paramedics on the line, the transcript indicates Atkism said: "They're going to get the (unintelligible) you need to sit down before you pass out. What did he stab you for?" The paramedics dispatcher got on the line and asked Atkism to repeat her location. The following exchange occurred:

"Atkism: . . . A gentleman just got stabbed in the throat.

"Medics: He got stabbed in the throat, you said?

"Atkism: Yes . . .

"Medics: Okay are you . . .

"Atkism: . . . and, and the blood is rushing . . .

"Medics: Okay, alright.

"Atkism: . . . pouring out[.]

[¶] . . . [¶]

"Atkism: . . . Sit down!

"Medics: Okay I have help on the way. How old is this person?

"Atkism: (speaking to victim) How old are you?"<sup>4</sup>

Atkism gave the dispatcher Lucious's age, told the dispatcher he was awake and breathing, and that a sergeant had just arrived. She told the dispatcher the man was wearing a brown coat, but could not recall if the person was black or white. Atkism stated: "It was like . . . I don't know . . . what color was he? Black guy." Atkism then informed the dispatcher she was speaking to the police sergeant.

The trial court tentatively ruled the call admissible under Evidence Code sections 1240 and 1241.<sup>5</sup> Defense counsel expressed concern that Atkism was relaying what someone else was telling her about the suspect's description, stating it was double hearsay at that point. After the prosecutor stated she believed Atkism was speaking with Lucious, defense counsel submitted and the court admitted the 911 call.

---

<sup>4</sup> The reference to "(speaking to victim)" is from the transcript of the 911 call.

<sup>5</sup> Evidence Code section 1241 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and [¶] (b) Was made while the declarant was engaged in such conduct."

## II. *Legal Principles and Standard of Review*

Evidence Code section 1240 governs the admission of out-of-court statements under the spontaneous statement exception to the hearsay rule. It provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." As for the first prong, the evidence must appear in some way that the declarant was a witness to the event to which his or her utterance relates. (*Ungefug v. D'Ambrosia* (1967) 250 Cal.App.2d 61, 68; *People v. Phillips* (2000) 22 Cal.4th 226, 235.) "Although this does not require direct proof that the declarant actually witnessed the event and a persuasive inference that he did is sufficient, the fact that the declarant was a percipient witness should not be purely a matter of speculation or conjecture." (*Ungefug*, at p. 68.) If this standard is not met, "the statement would be hearsay on hearsay and admissible only if each layer of hearsay separately met the requirements of an exception to the hearsay rule." (*Phillips*, at p. 235.)

The principles relating to the second prong of spontaneity are "well established." (*People v. Merriman* (2014) 60 Cal.4th 1, 64.) " "(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.] [Citation.] A statement

meeting these requirements is 'considered trustworthy, and admissible at trial despite its hearsay character, because "in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." ' ' ' (*Ibid.*)

"A number of factors may inform the court's inquiry as to whether the statement in question was made while the declarant was still under the stress and excitement of the startling event and before there was 'time to contrive and misrepresent.' [Citation.] Such factors include the passage of time between the startling event and the statement, whether the declarant blurted out the statement or made it in response to questioning, the declarant's emotional state and physical condition at the time of making the statement, and whether the content of the statement suggested an opportunity for reflection and fabrication. [Citations.] . . . [T]hese factors 'may be important, but solely as an indicator of the mental state of the declarant.' [Citation.] For this reason, no one factor or combination of factors is dispositive." (*People v. Merriman, supra*, 60 Cal.4th at p. 64.) Under this analysis, a statement made calmly and coherently also may have been made spontaneously, and the lapse of time between the startling event and the statement is not determinative of its spontaneity. (*Id.* at p. 65, citing *People v. Poggi* (1988) 45 Cal.3d 306, 319 & *People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234.)

"Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion." (*People v. Merriman, supra*, 60 Cal.4th at p. 65.) We will uphold the trial court's factual

determination of whether a declarant has personal knowledge if it is supported by substantial evidence, and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception. (*Ibid*; see *People v. Phillips, supra*, 22 Cal.4th at p. 236 [whether a declarant has personal knowledge is a factual question that is reviewed for substantial evidence].)

### III. *Contentions*

Brown contends the trial court prejudicially abused its discretion by admitting Atkism's 911 call into evidence. He maintains Atkism did not relate an event that she personally perceived but was merely repeating what she heard from another source, and thus the call was inadmissible hearsay not falling within the spontaneous utterance exception to the hearsay rule. Brown argues the error compels reversal because the call unfairly bolstered Lucious's credibility by corroborating his description. According to Brown, Lucious's credibility was suspect given inconsistencies in his statements to police and at the preliminary hearing, and the jury demonstrated skepticism about his testimony by acquitting Brown of Lucious's attempted murder. He argues absent admission of the 911 call, there was a reasonable chance of a more favorable verdict given Lucious's questionable credibility and evidence that police were given the name of another suspect as well as his own testimony that he did not know Lucious.

The People concede the call contains two layers of hearsay. They argue both layers are subject to the spontaneous statement exception to the hearsay rule in that the scene was chaotic and Atkism was witnessing or had just witnessed Lucious bleeding when she made her report. They maintain Atkism's statement about the suspect being

Black and wearing a brown coat was from Lucious, who was under the stress of excitement of just having been stabbed. The People argue that even if there was error, it was harmless in light of the overwhelming evidence establishing that Brown was the person who stabbed Lucious.

#### IV. *Analysis*

We reject Brown's challenge to admission of Atkism's 911 call. To the extent Brown's challenge encompasses Atkism's statement about Lucious having just been "stabbed" on grounds Atkism did not witness the stabbing, Brown's counsel did not object below that the statement fell outside the spontaneous statement hearsay exception for that reason, and any such claim is forfeited. (Evid. Code, § 353, subd. (a); see e.g., *People v. Weaver* (2012) 53 Cal.4th 1056, 1082.)

Nevertheless, we conclude the trial court did not err in admitting the entire call. The court reasonably concluded based on the transcript of the call that Atkism was relating her observation of Lucious's injury and deducing it was caused by a stabbing weapon, or relating Lucious's account of what had just happened to him. Further, she was describing Lucious's post-stabbing condition immediately after he was stabbed, including the blood "pouring out" of his neck. The content of the call permitted the trial court to reasonably infer Atkism personally perceived these events and was under the stress of excitement from the incident, and her statements to the 911 dispatcher were descriptions of Lucious's condition made without the opportunity for deliberation and reflection.

As for Atkism's description of the attacker as a black man, again, the transcript of the call suggests, and the court reasonably could conclude, that Atkism was speaking with Lucious, who had just then been attacked and personally saw his assailant, who he later identified as Brown, wiping blood off the knife he used to stab him. Lucious's statements to Atkism themselves meet the requirements for the spontaneous statement exception, analogous to those in *People v. Poggi, supra*, 45 Cal.3d 306. There, a police officer responding to a call found the victim about 30 minutes after she had been stabbed "in a very excited state, with blood flowing from her mouth . . . apparently attempting to recount what had happened to her but was rambling and incoherent." (*Poggi*, at p. 315.) In response to the officer's questioning, the victim described the crime while paramedics attempted to treat her wounds, but later died from her injuries. (*Id.* at p. 316.) The appellate court affirmed the trial court's ruling admitting the victim's statements as spontaneous within the meaning of the exception in the face of the defendant's argument that the passage of time, and the fact the victim was calm enough to respond to questioning, was inconsistent with spontaneity: "First, although [the victim] made the statements at issue about 30 minutes after the attack, it is undisputed that she was still under its influence. Second, it is also undisputed that she remained excited as she made the statements, even though she had become calm enough to speak coherently." (*Poggi*, at p. 319.)

Brown's reliance on *People v. Phillips, supra*, 22 Cal.4th 226 does not avail him. *Phillips* involved a brutal robbery murder, which the defendant sought to portray as a spontaneous shoot-out following a business deal gone awry rather than a preplanned,

calculated robbery murder. (*Id.* at p. 232.) The trial court in *Phillips* excluded the testimony of a person who would relate statements made by a friend of the defendant that the incident was a " 'business deal gone sour' " followed by a shoot-out. (*Id.* at p. 235.) It ruled there was no indication the friend had personally perceived the events. (*Ibid.*) The appellate court held the trial court did not abuse its discretion, noting first that the defendant did not suggest that any statement from an unidentified source to the friend would itself qualify as an exception, and thus admissibility of the friend's statement turned on whether he was relating events he saw himself or repeating what he had heard from some other source. (*Id.* at pp. 235-236.) The *Phillips* court pointed out the friend's statement to the witness did not indicate he had personally observed the events, and there was "virtually 'no evidence that there were eyewitnesses to the [crime] or that there were others in the immediate vicinity of the scene of its occurrence' [citation]" other than the defendant, his girlfriend and one of the victims. (*Id.* at p. 236.) The remaining evidence supported the court's finding that the friend could have been repeating what he had heard from someone else. (*Id.* at p. 237.)

Here, the trial court *admitted* Atkism's 911 call, and our role on appeal is to determine whether substantial evidence permitted it to reasonably conclude that both Atkism's statement, and the statements from Lucious related by her, fell within the spontaneous statement exception to the hearsay rule. Because we have concluded the trial court properly ruled they did based on evidence of Atkism's 911 call, we affirm the judgment.

Having found no error in the 911 call's admission into evidence, we need not decide the question of prejudice, or whether Brown's counsel was prejudicially ineffective in failing to lodge more specific objections to the 911 call.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.